

# Competition & Regulatory Newsletter

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## Quick Links

[Main article](#)  
[Other developments](#)  
[Merger control](#)  
[Antitrust](#)  
[General competition](#)

For a brief summary of how various APAC competition authorities have responded to the COVID-19 outbreak, see below. We have also published a briefing on the competition law considerations arising from COVID-19 in the EU and UK [here](#).

## The European Commission unveils a new Industrial Strategy for a globally competitive Europe

On 10 March 2020 the European Commission presented a new “**Industrial Strategy for Europe**” aimed at helping Europe’s industry deliver on three **key priorities**: maintaining European industry’s global competitiveness, making Europe climate-neutral by 2050 and shaping Europe’s digital future. The Industrial Strategy sets out the key drivers of Europe’s industrial transformation and proposes a comprehensive set of future actions. It was published alongside related initiatives on **small and medium sized enterprises** and the **European Single Market**.

It is worth noting that the Industrial Strategy was unveiled prior to the escalation of the current COVID-19 crisis to the extent we are now seeing. It remains to be seen what changes, if any, the Commission might make to the Industrial Strategy in light of the pandemic.

### Background

The publication of the Industrial Strategy follows a **call** from the European Council in March 2019 for a long-term EU industrial policy strategy, along with an action plan for strengthening and deepening the single market. The need for a new industrial way for Europe is also reflected in President von der Leyen’s **Political Guidelines**.

### Industrial Strategy: key competition elements

Underpinning the Industrial Strategy are a set of seven “fundamentals” for Europe’s industrial transformation, which are “inter-connected and reinforce each other”. Among the fundamentals identified are the need for a deeper and more digital single market and the establishment of a global level playing field.

#### *A deeper and more digital single market*

The Industrial Strategy notes that, in a fast changing world and at a time when Europe is embarking on its twin transitions towards climate neutrality and digital leadership, it is important to ensure that competition rules remain fit for

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[Main article](#)[Other developments](#)[Merger control](#)[Antitrust](#)[General competition](#)

purpose. It notes in this respect the Commission's ongoing review of the EU competition framework, which includes:

- Reviewing how current competition rules are applied, notably with regards to antitrust remedies, and whether certain rules are still fit for purpose, particularly in a digital and increasingly globalised world (for example, the rules governing horizontal and vertical agreements and the market definition notice);
- Considering how to improve case detection and speed up investigations;
- Evaluating existing merger control rules; and
- Conducting a "fitness check" of various State aid guidelines, which will culminate in the implementation of revised State aid rules by 2021 in priority areas, including energy and environmental aid. It is also worth noting that, in the midst of the current COVID-19 crisis, the Commission on 19 March 2020 adopted a Temporary Framework for State aid measures to support the economy during the outbreak (for further detail, see our recent [briefing](#) on the competition law considerations arising out of the COVID-19 pandemic).

The Industrial Strategy also repeats the Commission's intention to use sector enquiries to investigate new and emerging markets.

#### *Upholding a global level playing field*

The Industrial Strategy also notes that the EU "*should not be naïve to threats to fair competition and trade*". Among the initiatives envisaged, the Commission plans to publish a White Paper on an instrument to address the distortive effects caused by foreign subsidies within the Single Market, to be followed by a proposal for a legal instrument in 2021. The White Paper will also address the distortions that arise from the fact that European firms often lack reciprocal access to the home country markets of foreign state-owned companies.

The inclusion of this policy is unsurprising. The Commission's [prohibition of Siemens/Alstom](#) in February 2019 provoked extensive discussion and debate about the role of EU competition rules in fostering so-called "European champions", with a number of Member States - in particular France and Germany - calling for changes to the competition rules to allow the creation of such companies. In response, Commissioner Vestager has been [clear](#) on the need to ensure a level playing field for European companies, not through changes to the competition rules but by tackling issues of foreign subsidies and non-reciprocal market access.

#### **Foreign investment**

The Strategy also notes that Europe must be more strategic in the way it looks at risks associated with foreign investment, noting that it will make proposals to further strengthen the [framework for the screening of foreign investment](#) that entered into force in April 2019 and will apply from October 2020.

#### **Conclusion**

The Commission is resolute: Europe "*will always be the home of industry*", and the Commission "*is ready to do what it takes to make sure it stays that way*". Competition policy and foreign investment rules are a key element of the Commission's strategy, and - whilst calls for a wholesale rewrite of the rules in the name of Europe's global competitiveness have not gained support - we can nevertheless expect the

- [Main article](#)
- [Other developments](#)
  - [Merger control](#)
  - [Antitrust](#)
  - [General competition](#)

Commission's ongoing reviews of the competition rules to bring about a number of changes aimed at furthering its Industrial Strategy.

## Other developments

### Merger control

#### CMA approves Bauer's radio stations acquisition with behavioural remedies

On 12 March 2020 the Competition and Markets Authority (CMA) published its [final report](#) following its Phase 2 investigation into Bauer Media Group's completed acquisition of multiple radio stations businesses. The CMA conditionally approved the transaction. Between January and March 2019, Bauer acquired the entire business of UKRD Group Limited, and certain businesses of Lincs FM Group Limited, Celador Entertainment Limited and Wireless Group Limited. Through its acquisition of UKRD Group Limited, Bauer also acquired 50 per cent of the shares in First Radio Sales Limited (FRS) which provides more than 100 independent local radio stations with access to national advertisers.

The CMA evaluated the effects of Bauer's acquisitions in the following markets: the supply of radio advertising (locally and nationally) and the supply of representation for national advertising to radio stations in the UK. It concluded that the transaction raised competition concerns in the market for the supply of representation for national advertising to independent radio stations in the UK. The CMA identified competition concerns around FRS' future viability and its ability to provide an independent source of representation for independent commercial radio stations, in particular as Bauer's acquisitions take away half of FRS' business.

However, contrary to its [provisional findings](#), the CMA has decided there to be no impact on competition for local advertisers. In considering the concerns in relation to RFS, the CMA looked at a number of unusual features of this case and decided that a full divestment remedy would not be appropriate to remedy the concerns. The CMA instead decided a behavioural remedy would be more effective and required Bauer to provide advertising representation to independent radio stations on the same terms that the stations received it from FRS, for a ten year period.

### Antitrust

#### Court of Appeal issues judgment in Pfizer and Flynn case

On 10 March 2020 the UK Court of Appeal issued its [judgment](#) in Flynn Pharma Limited and Pfizer v CMA, the appeal of the Competition Appeal Tribunal's (CAT) [judgment](#) of 7 June 2018. The CMA concluded in 2016 that the two pharmaceutical companies had breached their dominant positions by charging unfair and excessive prices for phenytoin sodium capsules, an important anti-epilepsy drug. The CMA found this was a breach of Article 102 TFEU and Chapter II of the UK Competition Act and imposed a record fine of £84.2 million on Pfizer and £5.2 million on Flynn. In June 2018 the CAT set aside the CMA's decision and fine, and decided that the CMA incorrectly applied the legal test for unfair pricing (for further details on the CAT judgment, see [our briefing](#) on the topic). The CMA and Flynn appealed this judgment.

[Main article](#)[Other developments](#)[Merger control](#)[Antitrust](#)[General competition](#)

The Court of Appeal confirmed the CAT's interpretation of the [United Brands](#) legal test, which states that a price is unfair if it is "*unfair in itself or when compared to competing products*". The Court held that "in itself" and "competing products" are not strict alternatives; the reviewing competition authority will always have to consider evidence of comparator products, not just the price "in itself". The CMA's appeal on this ground failed. The Court of Appeal further clarified that the CMA has a basic duty to conduct a fair evaluation of all the evidence before it. However, this duty is context-dependent and discretionary. The Court of Appeal concluded that the CAT was wrong to state that the CMA had to conduct a full investigation of all comparators. The Court of Appeal did allow the CMA's argument that the CAT erred in requiring it to construct a hypothetical benchmark price.

The Court of Appeal re-affirmed the CAT's findings that the issue of abuse (including penalties) be remitted to the CMA. In dismissing Flynn's appeal, it clarified that the CAT's findings would not be binding on the CMA; when remitted, neither party is precluded from adducing new evidence or arguments on the remitted issues.

In a [statement](#) the CMA's Chief Executive Andrea Coscelli welcomed the judgment as an important clarification of the legal requirements for unfair pricing. The CMA will now review the elements remitted back to it.

A more detailed analysis will follow in an upcoming briefing on this judgment.

## General competition

### Competition enforcement in the APAC Region: the impact of COVID-19

The European Commission has encouraged parties to consider delaying merger filings due to disruptions caused by COVID-19 (please see our [recent briefing](#) on the effects of the outbreak on enforcement in Europe). Some competition authorities across the Asia-Pacific (APAC) region have also followed suit to temporarily suspend operations and are only maintaining a skeletal workforce amid the COVID-19 outbreak, but much of the APAC region continues to function as normal, in particular China's State Administration for Market Regulation (SAMR).

On 16 March 2020 the [Philippine Competition Commission](#) announced that it will not accept new merger notifications or evaluate notifications already submitted until 14 April 2020 (or after community quarantine measures in the Philippines are lifted). The running of the 30-day notification period as well as the filing period for pleadings, motions and the payment of fines have also been suspended.

This was promptly followed by the [Malaysia Competition Commission](#) announcing work restrictions and suspended work processes because of COVID-19. The situation has also been causing delays in Indonesian antitrust enforcement, where a hearing involving ride-hailing company Grab and a decision on a flight cartel will reportedly be delayed. The [Competition Commission of India](#) has adjourned all hearings until 31 March 2020, in addition to suspending merger filings, pre-filing consultations and antitrust complaints.

However, much of the APAC region continues to function as usual. In China, SAMR has accepted 37 merger review notifications and unconditionally cleared 39 cases since early February. Whilst cases under the simplified procedure are proceeding as normal, the review process may be prolonged for cases under the normal review procedure, particularly where the case is complex and third party feedback is required. It is likely that responses to SAMR consultation requests will be delayed and this will have a knock-on effect

Quick Links

- Main article
- Other developments
  - Merger control
  - Antitrust
  - General competition

on SAMR’s ability to evaluate market impact and remedies in a timely manner. In Hong Kong, it is reported that the Competition Commission has recently indicated that its investigation and enforcement work is progressing well in general. There has also been minimal disruption to the merger review processes in Japan and Taiwan, as merger filings are still reportedly accepted and reviewed as per usual procedures.

The impact of COVID-19 continues to evolve and therefore the impact on competition enforcement across APAC may change further as the situation develops.

<b>Brussels</b>	<b>London</b>	<b>Hong Kong</b>	<b>Beijing</b>
T +32 (0)2 737 94 00	T +44 (0)20 7600 1200	T +852 2521 0551	T +86 10 5965 0600

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